

CYPRESS COMMUNITY CHURCH

IBLA 98-265

Decided April 7, 1999

Appeal from a decision of the Hollister Resource Area Office, Bureau of Land Management, rejecting right-of-way application CACA 38231.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way–Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision rejecting an application for a right-of-way for a road under section 501(a) of FLPMA, 43 U.S.C. § 1767(a) (1994), is an exercise of discretion that will be affirmed where the decision appears to be a reasoned analysis of the factors involved and made in due regard for the public interest. Where BLM determines that an application, as submitted, would adversely affect a BLM sensitive species plant found on the land and suggests an alternative to ameliorate the impacts, but the applicant declines to accept the alternative, rejection of the application as submitted may be deemed appropriate.

APPEARANCES: Richard L. Adams, Executive Pastor, Cypress Community Church, Salinas, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Cypress Community Church (Cypress) has appealed from a decision of the Hollister Resource Area Office, dated March 24, 1998, rejecting right-of-way application CACA 38321, which sought road access across public lands located within the former Fort Ord Army Base based on environmental assessment EA CA-01901997-024. For the reasons set forth below, we affirm.

Cypress filed application CACA 38321 on May 14, 1997, seeking to cross a triangular parcel of Federal land in order to obtain access to the church premises at a signal light on State Highway 68. As submitted, the right-of-way was 85-feet wide and extended 330 feet across the Federal lands. The right-of-way consisted of three 15-foot lanes plus adjacent lands to be used for landscaping. Pursuant to this request, EA CA-01901997-024 was prepared by the Bureau of Land Management (BLM).

In addition to the proposal submitted by Cypress, the EA analyzed a no action alternative (Alternative II), as well as an alternative proposal which would permit only two 15-foot lanes and included no landscaping and required a conservation easement from Cypress for the protection of Congdon's tarplant, a BLM sensitive species found both on the lands sought for the right-of-way and on adjacent Cypress property (Alternative I). On November 26, 1997, the Hollister Area Manager approved a Finding of No Significant Impact/Decision Record (DR) which selected Alternative I for implementation.

A review of the DR establishes that there were two factors which influenced the Area Manager's decision. First was concern for the possible impact of the proposal on Congdon's tarplant. The EA had noted that the site involved was one of only four known habitats for Congdon's tarplant on Fort Ord's public lands and was, in fact, either the largest or second largest of those sites. The Area Manager noted that Alternative I was superior to the Cypress proposal because it impacted less land and included the grant of a conservation easement for the protection of Congdon's tarplant on the adjacent land owned by Cypress.

The second factor on which the Area Manager relied was that Alternative I involved the development of less acreage than the Cypress proposal. Under the Fort Ord Multispecies Habitat Management Plan (HMP), no more than 2 percent of natural habitats found within the designated Fort Ord Public Lands can be developed. This means that development is limited to 144 of the 7,200 acres under BLM jurisdiction. Since the Cypress proposal would be counted against the HMP limitation, lessening the amount of land involved would allow BLM to retain more flexibility with respect to granting other use applications involving the Fort Ord Public Lands.

By letter dated December 8, 1997, the Area Manager informed Cypress of his decision and provided it with a copy of the EA for its review and comment. Cypress responded by letter dated February 25, 1998. In its response, Cypress noted that, while it was "not excited" by the prospect of granting a conservation easement over its adjacent property, particularly since under the BLM proposal it would be monitored and maintained by a third party, Cypress "could live with that proposal." Letter dated February 25, 1998, at 2. However, Cypress refused to abandon its request for a three-lane access road, arguing that all three lanes were needed to provide safety for those entering and leaving the church premises. Thereafter, by decision dated March 24, 1998, BLM rejected the Cypress application as proposed. Cypress then pursued its appeal to the Board. ^{1/}

On appeal, Cypress challenges BLM's acceptance of Alternative I, essentially arguing that its proposal for an 85 foot-wide easement should

^{1/} On Sept. 8, 1998, Cypress filed a request seeking to have the Board expedite a decision in the instant appeal, noting that the issue involved was one not merely of convenience but of safety. By Order dated Oct. 14, 1998, the Board granted the motion to expedite review.

be granted without any alterations. 2/ Furthermore, Cypress expressly abandons its previous statement that it could live with the proposal for a conservation easement over its adjacent property, objecting strongly to any proposal which would involve third-party activities on its lands. 3/

The thrust of the Cypress response lies in its continued assertion that BLM is putting its congregation at risk without ever establishing "that the addition of the third lane and landscaping would have a significant negative impact" on Congdon's tarplant. (Statement of Reasons (SOR) at 3.) Cypress suggests that BLM has failed to justify its efforts to mitigate impacts on the tarplant by limiting the right-of-way to two lanes. We do not agree.

The EA clearly established that the proposal as submitted by Cypress would negatively impact a special status plant. See EA at 4. The fact that the proposal would not extirpate the plant at the site does not mean that BLM was precluded from attempting to minimize the impacts which would occur. The original Cypress proposal had envisioned one lane of ingress and two for egress at the signal light plus an additional 20 feet on each side of the road for landscaping purposes. In an attempt to ameliorate the negative impacts, BLM proposed an alternative which eliminated the landscaping acreage and limited egress to a single lane. This proposal, while, from Cypress' point of view, perhaps not as convenient or desirable as the application which it submitted, nevertheless clearly met the safety concerns which Cypress had cited in justification for its right-of-way application. 4/ Cypress was, of course, free to reject the BLM alternative. This it did. BLM then, as was its right, declined to approve Cypress' right-of-way application as submitted. But the fact remains that it was as much the refusal by Cypress to accept BLM's alternative proposal as it was the rejection by BLM of Cypress' original application that is responsible for continuing the "very real potential for human injury and loss of life" which Cypress cites as grounds for reversing BLM's decision. See SOR at 6.

2/ In this respect, we note that, while the Area Manager construed Cypress' Feb. 25 response as abandoning its request for a 20-foot wide landscaping border abutting both sides of the road, we are unable to find anything in that response which would fairly give rise to such an interpretation.

3/ Included in the proposed conservation easement was the requirement that the easement be maintained and monitored by a third party such as the California Native Plant Society.

4/ Thus, while the absence of a separate left-hand turn lane would slow the departure of members of Cypress' congregation, Alternative I would still allow egress and ingress at a signal light, removing the danger to those members of Cypress' congregation who wish to turn left at Highway 68 after services. Moreover, we note that Cypress' continued insistence on the need for an abutting area for landscaping is clearly not based on safety factors but rather on Cypress' desire to provide an attractive entrance to its premises. See SOR at 6.

[1] The Secretary of the Interior is authorized under section 501(a)(6) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(6) (1994), to grant rights-of-way over public lands for "roads, trails, highways, * * * or other means of transportation." Approval of an application for a right-of-way, however, is a matter committed to the Department's discretion. See Dale Ludington, 94 IBLA 167, 172 (1986); Lower Valley Power & Light, Inc., 82 IBLA 216 (1984). Thus, a BLM decision approving or rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM's decision. See, e.g., Coy Brown, 115 IBLA 347, 356 (1990); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988). We have noted many times that a party challenging a decision rendered by BLM in the exercise of its delegated authority has the affirmative burden of establishing error by a preponderance of the evidence. See Bender v. Clark, 744 F.2d 1424, 1429 (10th Cir. 1984); James Spur, Inc. v. Office of Surface Mining Reclamation and Enforcement (OSM), 133 IBLA 123, 178 (1995); Powderhorn Coal Co. v. OSM (On Reconsideration), 132 IBLA 36, 40 n.2 (1995). Leaving aside for the moment the question of third-party maintenance of the conservation easement, we must conclude that Cypress has simply failed to carry its burden with respect to BLM's decision declining to approve the Cypress right-of-way application as submitted.

The only matter which we believe warrants further comment is the question of third-party maintenance and monitoring of the conservation easement which BLM desires on appellant's adjacent property. As noted above, Cypress strenuously objects to this aspect of the EA, arguing both that it is unjustified and that it opens Cypress to potential liability for injuries sustained by the third party in monitoring and maintaining the conservation easement.

In this regard, we must agree with Cypress that the record before the Board at the present time fails to justify the imposition of third-party maintenance and monitoring. However, this is an issue which we feel is more appropriately reviewed in the context of a direct appeal by Cypress challenging the imposition of such a requirement. In other words, should Cypress refile an application limited, as proposed by BLM, to two 15-foot vehicle lanes and not including adjacent landscaping acreage and also agree to the desired conservation easement, the question of whether this easement should be subject to third-party maintenance and monitoring would be more properly joined.

Clearly this is an area in which the parties might be able to achieve a mutually agreeable resolution without necessitating intervention by this Board. On the other hand, should BLM insist on imposition of this provision, nothing in our decision herein precludes Cypress from seeking Board review of BLM's action at that time. But, absent an acceptance by Cypress of BLM's other conditions, conditions which we expressly affirm, review of this question at the present time is deemed to be premature.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as set forth above.

James L. Burski
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

